Opinion, Findings of Fact and Conclusions of Law, by Feinberg, J.

FEINBERG, D. J.

This is an admiralty action for personal injuries by plaintiff Carmelo Candiano against Moore-McCormack Lines, Inc. ("Shipowner"), owner of the ship on which Candiano was working when injured. Shipowner impleaded John W. McGrath Corporation ("Stevedore"), employer of Candiano and stevedore for Shipowner.[1]

Plaintiff was hit by a falling hatch beam weighing about a ton while working in the lower hold of the "S.S. Mormachawk" shortly after midnight, on the morning of February 18, 1961. The ship was at its berth at the 23rd Street Pier in Brooklyn. Shipowner denies liability and contests the alleged damage; Stevedore, while also arguing against plaintiff's recovery, does not strenuously contest its obligation to indemnify Shipowner if the latter is liable to plaintiff. Plaintiff's viable theory of recovery at this stage is unseaworthiness; a negligence count was dismissed during trial without objection.

Plaintiff, as part of a gang of carpenters, was checking cargo in the lower hold of No. 3 hatch on the night in question. The accident occurred while longshoremen, also employed by Stevedore, were engaged in placing a steel hatch beam on No. 3 tween deck hatch preparatory to covering up the hatch prior to sailing. While the steel hatch beam was being placed athwart tween deck hatch No. 3 and was suspended over the square of the hatch, a hook inserted into the opening at one of the ends of the hatch beam became dislodged and the beam fell into the lower hold. The heavy beam struck plaintiff and knocked him down. Plaintiff was rendered unconscious by the blow and injured severely, as discussed more fully below, and was taken out of the hold and off the ship by stretcher and transferred to a hospital.

Opinion, Findings of Fact and Conclusions of Law, by Feinberg, J.

The basis of plaintiff's claim is that the ship was unseaworthy because the device used to lower the hatch beam was not reasonably fit for its intended use. All parties agree that the longshoremen used a pontoon bridle to secure the beam to the cargo falls (or hoist rope). The bridle consisted of four equal lengths of wire; each had at one end a pontoon hook and was inserted into a hole at one end a pontoon hook and was attached at the other end to a common ring. One hook was inserted into a hole at one end of the twenty-foot long hatch beam and another hook was attached at the other end; the remaining two hooks were looped up and placed into the common ring. Plaintiff claims that a different type of bridle—a toggle beam bridle—was the proper appliance for lowering a steel hatch beam. The distinguishing feature of a toggle bridle is that at one end a metal bar rather than a hook is attached to a length of chain; by passing the chain and metal bar through the hole of a hatch beam and then positioning the bar properly, the hatch beam is prevented from falling off the bridle. Plaintiff argues that if a toggle beam bridle had been used instead of pontoon bridle, the hatch beam could not have been dislodged and it would not have fallen. Accordingly, plaintiff argues that an improper and unsafe appliance was used, thereby rendering the ship unseaworthy. Shipowner claims that the pontoon bridle was reasonably fit for its intended purpose and, in any event, toggle bridles were supplied by the ship and made available to Stevedore.

There is little doubt that the lowering mechanism utilizing the pontoon bridle, as it was actually used by the longshoremen, was unsafe and therefore unfit. The evidence shows that the hook that became dislodged had not been fully brought through the hole in the hatch beam and made secure to the standing part of the bridle. Shipowner's claim that the pontoon bridle was reasonably fit

is based upon the proposition that had this operation been performed, the hatch beam would have been secure. Shipowner thus argues that the longshoremen's failure to properly secure the beam was "operational negligence," so that no unseaworthiness had as yet resulted. The cases in this circuit do make a distinction between operational negligence and an unseaworthy condition negligently created,[2] denying the ship's liability in the former case. The difficulty lies in defining when negligent conduct ends and an unseaworthy condition begins. In *Grillea* v. *United States,* 232 F. 2d 919, 922 (2d Cir. 1956), Judge Learned Hand stated:

> It would be futile to try to draw any line between situations in which the defect is only an incident in a continuous operation, and those in which some intermediate step is to be taken as making the ship unseaworthy. Nevertheless, it is necessary to separate the two situations, even though each case must turn on its particular circumstances.

In *Puddu* v. *Royal Netherlands S.S. Co.,* 303 F. 2d 752, 756 (2d Cir.) (per curiam in banc), *cert. denied,* 371 U. S. 480 (1962), Judge Hays, in a concurring opinion stated (303 F. 2d 757):

> The difficulty with the concept of unseaworthiness arises from the fact that while the authorities hold that there is liability without fault, there is no case which holds that there is absolute liability. The situation demands, then, that without regard to fault, we fix a point short of absolute liability. But logical coordinates for fixing a point, such as the time during which a particular condition continues to exist, are entirely lacking. Time is obviously irrelevant since notice to the shipowner is of consequence only if his liability is

limited by fault. See Mitchell v. Trawler Racer, Inc., 362 U. S. 539, 80 S. Ct. 926, 4 L. Ed. [2d] 941 (1960).

Perhaps the best that can be done is, like Judge Hand in Grillea v. United States, 232 F. 2d 919 (2d Cir. 1956), to take as the starting point a condition of reasonable fitness for intended use, to consider this condition as impaired by the conduct or process which is the subject of litigation, and to call the resulting condition "unseaworthiness." The conduct or process by which the fitness is changed to unfitness is not then to be claissified as itself constituting unseaworthiness.

A ship is not unseaworthy because it has glass in a window which might be broken. The injuries of a seaman who negligently breaks such a glass are not the result of unseaworthiness, nor are the injuries of a seaman who is cut by the falling glass. But injury incurred in stepping on the broken glass does result from unseaworthiness.

The rule is far from satisfactory, but it has the virtue of being possible, though not easy, of application, and of having behind it the authority of a great judge. The situation itself does not permit the formation of a really satisfying rule.

This distinction was recently re-affirmed in *Norfleet* v. *Isthmian Lines, Inc.* —— F. 2d —— (2d Cir. 1966).

In *Grillea,* the wrong hatch cover was placed over a pad-eye "only a short time" before libelant, a longshoreman, stepped on it and it gave way beneath him. This was held (2-1) to constitute a condition of unseaworthiness. In *Puddu,* a boom buckled while a rain tent was being raised and the falls of a winch were being stretched to a dangerously large angle. It was there held (7-2) that no condition of unseaworthiness had as yet been created.

The distinction has been questioned in this circuit[3] and is not accepted in some other jurisdictions.[4] However,

accepting it as the applicable law in this circuit, I find that an unseaworthy condition had already come into being at the time the hatch beam fell and this condition caused the injury to plaintiff. There was an appreciable period of time after the hatch beam was secured to the cargo falls and before the beam fell off as it was being lowered. Once the beam was attached to the pontoon bridle—albeit insecurely, as later became clear—the lowering mechanism was clearly unsafe and, therefore, unseaworthy. The negligence of the stevedores in failing properly to secure the hook holding the beam had already been completed. Therefore, under the *Grilled-Puddu* distinction, the ship was unseaworthy at that time. Concededly, determination of the dividing line between operational negligence and an unseaworthy condition is difficult but crucial, and much depends on what is considered to be the negligent act that has or has not come to and end.[5] However, my finding is supported by *Strika* v. *Netherlands Ministry of Traffic,* 185 F. 2d 555 (2d Cir. 1950), *cert. denied,* 341 U. S. 904 (1951), where the manner of hooking up two bridles to lift a heavy piece of metal was unsafe and rendered the ship's gear unseaworthy. See also *Skibinski* v. *Waterman SS. Corp.,* 242 F. Supp. 290 (S.D.N.Y. 1965), relying on *Strika,* where plaintiff was injured because an open-mouth cargo hook, without any locking device, was used to lower a ladder which fell upon plaintiff. *But cf. Massa* v. *C. A. Venezuelan Navigacion,* 332 F. 2d 779 (2d Cir.), *cert. denied,* 379 U. S. 914 (1964).[6]

Shipowner also contends that the ship cannot be held unseaworthy because proper equipment—a toggle bridle—was on board and available. However, this contention was squarely met and rejected in *Strika, supra,* where Judge Learned Hand stated (185 F. 2d at 556):

> [B]ut other "bridles" were available which could have been used, and which had a single ring with four

> lengths of wire. These concededly would have been suitable, and the defendant asserts that their presence made the ship seaworthy, even if they were not used. In answer we need only cite Mahnich v. Southern S. S. Co. [321 U. S. 96 (1944.]

In Mahnich, cited by the court, a seaman was injured when a staging collapsed because a piece of defective rope parted. Sound rope was available on board, which could have been but was not used. The Court held that the ship was unseaworthy and that any negligence of the ship's officers in selecting and using defective, rather than proper, rope did not relieve the ship of the duty of furnishing "a seaworthy staging." Clearly, this reasoning applies to many cases where an unseaworthy condition has been negligently created, but proper equipment is on board. Thus, if a seaman should negligently remove a hatch cover leaving a dangerous hole, that portion of the deck would thereafter be unseaworthy unless the hole was covered up. The proper equipment to cover the hole would be available, yet it would not seem that this would insulate the ship against a claim of unseaworthiness. This reasoning is implicit in *Grillea, supra,* where a wrong hatch cover was used to cover a padeye. Although a proper hatch cover was available, the ship was nevertheless unseaworthy. Since a longshoreman doing seamen's work on board a ship is extended the protection of the doctrine of unseaworthiness to the same extent as a seaman is, the "other equipment" argument would fail in his case as well. Indeed, in *Grillea,* the successful libelant was a longshoreman

In *Mosley* v. *Cia. Mar. Adra, S. A.,* 314 F. 2d 223 (2d Cir.), *cert. denied,* 375 U. S. 829, 835 (1963), two members of the court of appeals of this circuit agreed that a ship could be unseaworthy because of improper lighting in the

hold, where plaintiff longshoreman was loading cargo, even though adequate portable lights were available on board.[7] This view was reinforced recently by *Waldron* v. *Moore-McCormack Lines, Inc.*, —— F. 2d ——, —— (2d Cir. 1966), where the court said in dictum:

> It is with respect to the ship's gear, equipment and appliances that the most significant developments along liberal lines have taken place. *It now makes no difference that other safe gear was available but not used.* See, e.g., *Mahnick* v. *Southern S.S. Co.*, 1944, 321 U. S. 96. Shore workers, including longshoremen and others performing tasks traditionally the work of seamen, became entitled to the benefits of the warranty of seaworthiness. *Seas Shipping Co.* v. *Sieracki*, 1946, 328 U. S. 85. And the doctrine has been applied to them even if the defective gear was supplied by the stevedore who brought it board ship. See, e.g., *Alaska S.S. Co.* v. *Petterson*, 1954, 347 U. S. 396, affirming 205 F. 2d 478 (9 Cir., 1953). *Even if the gear or appliances were not defective, a maladjustment might make them dangerous and the vessel could be found unseaworthy. Crumady* v. *The Joachim Hendrick Fisser*, 1959, 358 U. S. 423. So also with a stuck valve that could only be "broken" by the use of tools or several men working together. *American President Lines, Ltd.* v. *Redfern*, 9 Cir., 1965, 345 F. 2d 629. So also with a portable aluminum ladder leading to the hold which slipped out of place and fell due to the movement of the ship, despite the fact that an officer had placed a man to hold it and had told him to keep watch over it. *Reid* v. *Quebec Paper Sales & Transp. Co.*, 2 Cir., 1965, 340 F. 2d 34. Other instances of dangerous conditions caused by defects in, *or analogous improper use of*, various types of gear and equipment could be multiplied.[8]

Under the circumstances, then, the fact that a toggle bridle was available to the longshoreman does not require a finding that the ship was seaworthy.

II

After the one-ton beam hit him on the morning of February 19, 1961, plaintiff was knocked unconscious and was taken off the ship on a stretcher. One witness testified that plaintiff appeared to be dead. Thereafter, with the exception of a few days, plaintiff was hospitalized until the end of March.

The preponderance of evidence shows that plaintiff suffered severe injuries as a result of the accident. A cerebral concussion was incurred, leading to recurrent headaches, severe dizziness and asthenopia (eye fatigue). It further appears that plaintiff suffers from hypersensitivity on his forehead. An examining neurologist, Dr. Ralph A. Olson, felt that all of these conditions were a permanent residual of the concussion. Shipowner attempted to explain away some of plaintiff's complaints generally as the result, not of an underlying organic neurological involvement, but of conversion hysteria, defined as an emotional disorder in which anxiety is unconsciously converted into physical symptoms. Since the conversion hysteria, if any, followed the accident and there is no evidence that the hysteria was caused by something other than the accident, this "explanation" is meaningless insofar as assessment of damages is involved. No argument is made by defendant that "imagined" pain is less uncomfortable than "valid" pain.

Turning to injuries not relating to the nervous system as such, Dr. Harry Sherman, an orthopedic surgeon, testified that plaintiff incurred, due to the accident, scars on his head and chin, a nose deformity and fracture of nasal bones, crepitus (grating) and pain when his neck moves,

a bony elevation of the collar bone, atrophy of the shoulder muscles and consequent loss of movement in abduction and flexion, and restriction of trunk motion. These injuries are permanent, and the left arm will never be able to be used for physical exertion. Plaintiff also suffered multiple lacerations of the nose and forehead and fractures of the clavicle, rib and scapula. Shipowner's witness, Dr. Balensweig, agreed that there was "mild" atrophy of the left shoulder and that plaintiff could not go back to work as a carpenter. Finally, plaintiff testified he had suffered a great deal of pain, as might be the expected result of this accident.

Plaintiff was forty-seven years old at the time of the accident; he is now about fifty-three. The parties stipulated that plaintiff's work-life expectancy would be to age sixty-five, and his life expectancy would be 27.1 years as of the date of the accident. Plaintiff's average annual earnings over the last six years that he worked, based on stipulated figures, were $3,693. Although plaintiff clearly has proved an inability to continue in the occupation he had engaged in at the time of the accident, the issue of how much earning capacity plaintiff has been deprived of remains.

> The general principle is easily stated. The objective is to place the libelant in the same economic position as would have been his if the injury had not occurred. We seek to accomplish this goal by a formula which, stated in an oversimplified form, consists of determining what libelant's annual earning power would have been but for the injury, deducting what it will be thereafter, multiplying the result by libelant's expectancy, and discounting the product to present value. We recognize the delusive exactness of all this since, among other defects, life expectancies are averages and the

> formula assumes what we know to be usually contrary to the fact, namely, that the injured party will be fully employed; but it is the best we have. Difficulties come in applying the formula to a specific case. . . .

Conte v. *Flota Mercante del Estado*, 277 F. 2d 664, 669 (2d Cir. 1960). The burden of proving damages and damages is, of course, on plaintiff, as well as the duty to mitigate damage. *Puppioni* v. *Luckenbach S.S. Co.*, 286 F. 2d 340, 344 (2d Cir. 1961); *Litwinowicz* v. *Weyerhaeuser S.S. Co.*, 179 F. Supp. 812, 824 (E.D. Pa. 1959).

In this action plaintiff is not demonstrably unemployable. Of course, the court must consider such factors as age and lack of varied experience. Nonetheless, the conclusion that labor is now entirely foreclosed to Candiano is unwarranted on the facts in this case. For the first year after his accident, I conclude that plaintiff was unable to work at all. Thereafter, plaintiff should have been able to, and will be able to, average one-third of his former earnings as a carpenter in some other line of endeavor. Two-thirds of plaintiff's average earnings before the accident is $2,462. About five years have elapsed since the accident, for a total loss of past earnings of $13,541 (one year at $3,693 and four years at $2,462). Plaintiff has asked for pre-judgment interest. Taking into account the uncertainty over the extent of his employability and the fact that no deduction, in my discretion, is being made for income taxes, I decline in the exercise of discretion in this admiralty case to award pre-judgment interest, as requested by plaintiff.[9] Plaintiff has a stipulated work expectancy of about twelve more years for a total of lost future earnings (12 times $2,462) of $29,544. In the exercise of discretion, future earnings will be discounted at four per cent, *Alexander* v. *Nash-Kelvinator Corp.*, 271 F. 2d 524, 527 (2d Cir. 1959),

producing $23,118 for loss of future earnings.[10] Plaintiff proved medical and hospital expenses of $2,374.65. For pain and suffering, including permanent physical damage, I award slightly under $11,000, which makes a round figure of total damages of $50,000.

Shipowner alleged and had the burden of proving plaintiff's contributory negligence. Shipowner's claim is that Candiano unreasonably remained in the area in which beams were being lowered although he knew that the operation was in progress. It is true that Nuccio, a carpenter working with plaintiff, testified that shortly before the accident he ordered the carpenters in the hold, including Candiano, away from under the opening because the hold was to be covered up. This witness lacked credibility, however; *e.g.*, he testified that he had discussed the case with nobody. Under all the circumstances, I find that Shipowner has not met its burden of demonstrating contributory negligence by plaintiff.

III

Shipowner has a claim over for indemnity against Stevedore, based upon breach of Stevedore's warranty of workmanlike service. *Mortensen* v. *A/S Clittre*, 348 F. 2d 383 (2d Cir. 1965); *DeGioia* v. *United States Lines Co.*, 304 F. 2d 421, 424 (2d Cir. 1962). Improper securing of the bridle in this case by longshoremen constituted a breach of this warranty, for which Shipowner is entitled to recover its judgment debt to plaintiff and its reasonable expenses of defending this action, including counsel fees and disbursements.

Accordingly, plaintiff's injuries were proximately caused by the unseaworthiness of the vessel and he is entitled to a judgment of $50,000 against Shipowner; the latter is

entitled to a judgment in like amount, plus its reasonable expenses of defending the action, against Stevedore. The foregoing constitute the required findings of fact and conclusions of law.

Dated: New York, N. Y., March 15, 1966.

WILFRED FEINLING
U.S.D.J.

FOOTNOTES

[1] Plaintiff's action on the civil side of the court was transferred to the admiralty side by order dated April 22, 1963. In this opinion, for the sake of convenience, the parties will be referred to as they appeared in the original caption, *e.g.*, "plaintiff" instead of "libelant."

[2] See Note, *The Doctrine of Unseaworthiness in the Lower Federal Courts*, 76 Harv. L. Rev. 819, 827-28 (1963).

[3] See Reid v. Quebec Paper Sales & Transp. Co., 340 F. 2d 34, 37 (2d Cir. 1965).

[4] Ferrante v. Swedish Am. Lines, 331 F. 2d 571 (3d Cir.), *cert. dismissed*, 379 U. S. 801 (1964); Scott v. Isbrandtsen Co., 327 F. 2d 113 (4th Cir. 1964), *Contra*, Billeci v. United States, 298 F. 2d 703 (9th Cir. 1962).

[5] See Reid v. Quebec Paper Sales & Transp. Co., *supra* note 3, at 38 n. 5.

[6] Although Shipowner and Stevedore cite *Massa* as an example of operational negligence, it is more likely that the case simply held that the appliance in question could be deemed reasonably fit. The court said (332 F. 2d at 781):

> Nor can we say that the plaintiff and his co-worker had rendered the ship unseaworthy by placing the tongs in the wrong holes. The doctrine of unseaworthiness requires no more than that a ship and appurtenances be reasonably fit for their intended use, and *the trial court was justified in concluding that the pallets were reasonably fit.* (Emphasis added.)

[7] Judge Marshall, in an opinion concurred in by Judge Friendly, reversed a verdict for plaintiff because an alternative theory of un-

seaworthiness had erroneously been submitted to the jury. Judge Clark, dissenting, argued that both theories, including the claim of inadequate lighting, were sufficient to sustain the verdict of unseaworthiness. Both Judge Clark and Judge Marshall agreed that a finding of unseaworthiness based upon inadequate lighting alone would have been sustained. Judge Friendly, concurring in the reversal would not have found unseaworthiness because of inadequate lighting in the hold unless there was a showing that the ship did not have adequate portable lights at the disposal of the stevedores, citing Mollica v. Compania Sud-Americana de Vapores, 202 F. 2d 25 (2d Cir.), *cert. denied*, 345 U. S. 965 (1953); and Ezekiel v. Volusia S.S. Co., 297 F. 2d 215 (2d Cir. 1961), *cert. denied*, 369 U. S. 843 (1962).

[8] (Emphasis added; footnote omitted.) There was a dissent in *Waldron*, but it is clear that all three judges (Medina, Lumbard and Smith) agreed on the dictum. *E.g.*, the dissent (per Smith, J.) rejected a defense to unseaworthiness "that the vessel had available safe equipment which was not used." —— F. 2d at ——.

[9] It is unnecessary to deal with Stevedore's argument (Post-Trial Brief, pp. 1-3) that pre-judgment interest should be denied to longshoremen who, under the terms of the Longshormen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.*, do not bear the cost of their medical treatment and can receive disability compensation, thus making inapplicable the rationale for pre-judgment interest stated in Petition of the City of New York, 332 F. 2d 1006 (2d Cir.), *cert. denied*, 379 U. S. 922 (1964).

[10] 1 Committee on Pattern Jury Instructions—Ass'n of Supreme Court Justices, New York Pattern Jury Instructions—Civil 570 (1965).

Judgment

The issues in the above entitled action having been brought on regularly for trial before the Honorable Wilfred Feinberg, United States District Judge on December 13, 14, 15 and 16, 1965 and the Court at the conclusion of the evidence having reserved decision, and the Court thereafter on March 15, 1966 having handed down its Opinion decision constituting the Court's findings of fact and conclusions of law in favor of the plaintiff as against the defendant and third-party plaintiff and in favor of the defendant and third-party plaintiff as against the third-party defendant, it is

ORDERED, ADJUDGED AND DECREED: That the plaintiff Carmelo Candiano have judgment against the defendant and third-party plaintiff Moore-McCormack Lines, Inc., in the sum of $50,000 and it is further,

ORDERED, ADJUDGED AND DECREED: That the defendant and third-party plaintiff Moore-McCormack Lines, Inc., have judgment against the third-party defendant John W. McGrath Corporation in the sum of $50,000 plus its reasonable expenses in defending this action including counsel fees and disbursements.

Dated: New York, N. Y., March 16th, 1966.

JOHN J. OLEAR, JR.,
Clerk.

March 25, 1966.

Cards taxed in favor of defendant third-party plaintiff as against the third-party defendant in the sum of $138.59 and added to judgment.

JOHN J. OLEAR, JR.,
Clerk.

Judgment.

March 25, 1966.

Cards taxed in the sum of $241.76 in favor of plaintiff as against the defendant third-party plaintiff and added to judgment.

JOHN J. OLEAR, JR.,
Clerk.

Judgment.

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a Stated Term of the United States of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the first day of August one thousand nine hundred and sixty-seven.

Present: HON. STERRY R. WATERMAN,
HON. LEONARD P. MOORE,
HON. IRVING R. KAUFMAN,
Circuit Judges.

Carmelo Candiano,
Plaintiff-Appellee,

v.

Moore-McCormack Lines, Inc.,
Defendant and Third-Party Plaintiff-Appellant,

John W. McGrath Corp.,
Third-Party Defendant-Appellee.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

Judgment.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed with costs to the plaintiff-appellee.

A. DANIEL FUSARO
Clerk

By: VINCENT A. CARLIN
Chief Deputy Clerk

Order Denying Petition for Rehearing.

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the fourth day of December, one thousand nine hundred and sixty-seven.

Present: HON. STERRY R. WATERMAN,
HON. LEONARD P. MOORE,
HON. IRVING R. KAUFMAN,
Circuit Judges.

Carmelo Candiano,
Plaintiff-Appellee,

v.

Moore-McCormack Lines, Inc.,
Defendant and Third-Party Plaintiff-Appellant,

John W. McGrath Corp.,
Third-Party Defendant-Appellee.

A petition for a rehearing having been filed herein by counsel for the appellant,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. DANIEL FUSARO
Clerk

Opinion of the United States Court of Appeals, Second Circuit.

CARMELO CANDIANO, *Plaintiff-Appellee,*

vs.

MOORE-McCORMACK LINES, INC., *Defendant-Appellant,*

vs.

JOHN W. McGRATH CORP., *Third-Party Defendant-Appellee.*

United States Court of Appeals, Second Circuit,
August 1, 1967.

No. 30696.

Rehearing denied December 4, 1967.

Before: WATERMAN, MOORE and KAUFMAN, Ct. JJ.

PERSONAL INJURY—1311. Seaworthiness—1312. What Constitutes Unseaworthiness and Negligence—STEVEDORES —12. Liability for Personal Injury and Death.

The *Grillea* doctrine of "operational negligence" is no longer a defense to a longshoreman's personal injury claim based on unseaworthiness. Although there is no logical basis for holding a soundly constructed and completely equipped vessel unseaworthy, the Supreme Court in *Mascuilli* vs. *U. S.* used the term as a means imposing absolute liability on ship-owner and stevedore. Any change in the law must be by legislation or Supreme Court decision.

Opinion of the United States Court of Appeals, Second Circuit.

MARTIN J. MCHUGH (JOSEPH F. MCGOLDRICK, MCHUGH & LEONARD, JAMES M. LEONARD, on Brief), *for Defendant-Appellant.*

EZEKIEL JASPER (MAX D. KRONGOLD, on Brief), *for Plaintiff-Appellee.*

Appeal from a judgment of the United States District Court for the Southern District of New York, WILFRED FEINBERG, D. J., 1967 A. M. C. 635, which awarded plaintiff-appellee Candiano, a longshoreman, recovery for personal injuries sustained while working aboard ship. Affirmed. LEONARD P. MOORE, Ct. J.:

Plaintiff, Carmelo Candiano (appellee), a longshoreman, employed by the stevedore, John W. McGrath Corporation (McGrath), was injured while working in the hold of the S. S. *Mormachawk* owned by Moore-McCormack Lines, Inc. (Mormac). Plaintiff sued Mormac which impleaded McGrath as a third-party defendant. The district court adjudged Mormac liable to plaintiff in the sum of $50,000 and McGrath liable to Mormac for this amount plus Mormac's expenses for defending the action. Mormac appeals, represented on appeal by McGrath's counsel.

The facts as found by the trial court are accepted by appellant Mormac, which challenges only the conclusions of law based thereon. The injury was caused by a beam, which, while being lowered into the lower hold of the No. 3 hatch of the ship, fell and struck plaintiff. The beam was attached to the lowering mechanism by two hooks, one inserted in a hole at one end of the beam, the other hook in a hole at the other end. The operation of securing the beam was carried on by fellow employees. While the beam was being lowered, one of the hooks which apparently had

not been full brought through the hole and secured, became dislodged and the beam fell.

The trial court held that once the negligent attachment had been made, the ship was unseaworthy but also found that "[T]here was an appreciable period of time after the hatch beam was secured to the cargo falls and before the beam fell off as it was being lowered." Whether such "an appreciable period of time" is sufficient to defeat the application of the doctrine of operational negligence (the district court found that it was) is apparently no longer the relevant inquiry to be made as the doctrine of operational negligence now seems to have been rejected by the Supreme Court as a factor in the determination of liability. See *Mascuilli* vs. *United States,* 387 U. S. 237, 1967 A. M. C. 1702, summarily reversing, 1966 A. M. C. 2503, 358 F.(2d) 133 (3 Cir., 1966).

In *Grillea* vs. *United States,* 1956 A. M. C. 1009, 232 F.(2d) 919, 922 (2 Cir., 1956), this Circuit distinguished between the legal consequences flowing from operational negligence and those flowing from unseaworthiness holding that a ship is not rendered unseaworthy by a negligent act that causes an accident during the progress of work on board so long as the act could be "considered as an incident in a continuous course of operation." *Grillea* and a long line of other decisions of this Court attempting to define where operational negligence ends and unseaworthiness begins would seem to be no longer controlling in the light of *Mascuilli.* Although there is no basis in logic for attributing unseaworthiness to a vessel which is in every respect soundly constructed and completely equipped merely because of the negligence of longshoremen or crew members engaged in an operation on board, the term has been created by judicial fiat and used for all practical purposes for imposing absolute liability on shipowner and stevedore.

Opinion of the United States Court of Appeals, Second Circuit.

In *Mascuilli,* the question before the Supreme Court on certiorari, to which the Court gave an affirmative answer, was:

"Does dangerous condition caused by stevedore's negligent handling of proper equipment render vessel unseaworthy and its owner liable for resulting injuries?"

The facts are to be found in the district court opinion, 1965 A. M. C. 1880, 241 F. Supp. 354 (E. D. Pa., 1965). A longshoreman Mascuilli had been killed during a loading operation when one or more of his fellow longshoremen negligently caused both the starboard and port vangs on the loading boom to become taut simultaneously thus causing one of the vangs to break. The parts thereof fell on Maseuilli, who had been engaged in a different aspect of the loading operation, and inflicted mortal wounds. The district court sitting without a jury expressly found that the loading equipment was in a sound and safe condition. Finding of fact No. 35 read as follows:

"35. In summary, the Court finds that the vessel and all of its equipment was in a seaworthy condition at all times, and remained so throughout the entire loading operations. The accident was caused solely by the negligent operation of the stevedoring crew using seaworthy equipment in such a manner as to cause the accident to occur *so instantaneously* that the Third Officer was unable to warn anyone or prevent its happening." 241 F. Supp. at 362. (Emphasis added.)

The Third Circuit affirmed the holding that the vessel was not unseaworthy solely on the basis of the district court's finding No. 35 that the accident had been caused solely by the negligence of the stevedoring crew. 1966 A. M. C. 2503, 358 F.(2d) at 133. The Supreme Court thereupon summarily reversed, citing *Mahnich* vs. *Southern S. S. Co.,* 321 U. S. 96, 1944 A. M. C. 1 (1944) and *Crumady* vs. *J. H. Fisser,* 358 U. S. 423, 1959 A. M. C. 580 (1959).

Cf. *Waldron* vs. *Moore-McCormack Lines, Inc.*, 386 U. S. 724, 1967 A. M. C. 579 (opinion stresses the "broad remedial purposes of the doctrine of unseaworthiness").

Appellant requests a reconsideration by this court of the longshoreman-shipowner-stevedore triangle and points to the virtual repeal by court decision of the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. Code, sec. 901, *et seq.* The law in this field is now quite clear; any change must be by legislation or by Supreme Court decision.

Affirmed.

PETITION FOR REHEARING.

United States Court of Appeals, Second Circuit, December 4, 1967.

No. 30696.

Before: WATERMAN, MOORE,* and KAUFMAN, Ct. JJ.

MARTIN J. MCHUGH, for *Petitioner-Defendant-Appellant, Moore-McCormack Lines, Inc.*

PER CURIAM:

Petition for rehearing denied. Judge MOORE concurs in the denial of the petition for the reasons set forth in his memorandum.

LEONARD P. MOORE, Ct. J. (concurring):

The defendant-appellant Moore-McCormack Lines, Inc., seeks by petition a rehearing and reconsideration of the

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* Concurring.

opinion and decision of this court (August 1, 1967) in *Candiano* vs. *Moore-McCormack Lines, Inc.*, 1967 A. M. C. 2312, 382 F. (2d) 961, which resulted in an affirmance of a judgment entered on March 16, 1966, in favor of the plaintiff against appellant, for personal injuries sustained aboard a ship owned by appellant. The appeal was argued on December 13, 1966. The principl ground for rehearing is the claim that this court misinterpreted the Supreme Court's decision in *Mascuilli vs. United States*, 387 U. S. 237, 1967 A. M. C. 1702 (May 22, 1967) in relying upon that decision as a basis for affirmance herein. In my opinion, petitioner claims quite properly that *Mascuilli* being undecided at the time of the filing of its brief and of the oral argument, it had no opportunity to present its views as to the effect, if any, of *Mascuilli* upon this case.

On the same day (August 1, 1967) as this Court decided the *Candiano* case, it handed down its decision in *Alexander* vs. *Bethlehem Steel Corporation*, 1967 A. M. C. 2324, F.(2d) 963. The issues presented are substantially similar. In the petition for a rehearing *en banc* in Alexander, counsel claims that "this Court has been misled by the incorrect presentation of the supposed issue before the Supreme Court in *Mascuilli* as printed in 35 L. W. 3052." Reference is made to the three specific questions contained in the petition for certiorari in *Mascuilli* and the argument is made that the Supreme Court's granting of the writ and reversing the judgment does not justify an assumption that that Court has rejected "the doctrine of 'operational negligence' * * * as a factor in the determination of liability."

Before considering whether a rehearing would or should alter the decision, a brief review of the factual situations upon which liability is asserted must be made.

In *Alexander* the concatenation of events was the lowering of the steel by the crane operator and the striking by the steel of the protruding dunnage. If the dunnage had

not been protruding, the possibly too-rapid lowering would not have been of consequence. If a superabundance of caution had been exercised in the lowering operation, probably the dunnage would not have been propelled through the air so as to strike the plaintiff. The jury's findings of no negligence by the shipowner and of unseaworthiness establish the basis of that judgment.

In *Candiano* the beam fell because the hooks securing it to the lowering mechanism had been improperly attached by fellow employees.

At the time of arguments of *Alexander* and *Candiano*, there was a plethora of cases involving negligence and unseaworthiness and a plaucity of consistency. No legal principle which might serve as a guide for the future could be gleaned from these decisions. In this circuit, the panels were hopelessly divided,[1] other circuits achieved no greater

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[1] Compare *Norfleet* vs. *Isthmian Lines, Inc.*, 1966 A. M. C. 80, 355 F.(2d) 359 (2 Cir., 1964); *Guarracino* vs. *Luckenbach Steamship Co.*, 1964 A. M. C. 2240, 333 F.(2d) 646 (2 Cir., 1964); *Massa* vs. *C. A. Venezualen Navigacion*, 1964 A. M. C. 1375, 332 F.(2d) 779 (2 Cir., 1964); *Spinelli* vs. *Isthmian*, 1965 A. M. C. 254, 326 F.(2d) 870 (2 Cir., 1964), *cert. denied*, 377 U. S. 935, 1966 A. M. C. 2792 (1964); *Mosley* vs. *Cia. Mar. S.A.*, 1963 A. M. C. 1951, 314 F.(2d) 223 (2 Cir., 1963), *cert. denied*, 375 U. S. 829, 1963 A. M. C. 2698 (1963); *Puddu* vs. *Royal Netherlands S. S. Co.*, 1962 A. M. C. 419, 303 F.(2d) 752 (2 Cir., *en banc* 1962), *cert. denied*, 371 U. S. 840, 1963 A. M. C. 280 (1962); *Grillea* vs. *United States*, 1956 A. M. C. 1009, 232 F.(2d) 919 (2 Cir., 1956); *Poignant* vs. *United States*, 1955 A. M. C. 1955, 225 F.(2d) 595 (2 Cir., 1955); *Manhat* vs. *United States*, 1955 A. M. C. 513, 220 F.(2d) 143 (2 Cir.), *cert. denied*, 349 U. S. 966 (1955), with *Radovich* vs. *Cunard S. S. Co.*, 1966 A. M. C. 2426, 364 F.(2d) 149 (2 Cir., 1966); *Mosley* vs. *Cia Mar. Adra S. A.*, 1966 A M. C. 2017, 362 F.(2d) 118 (2 Cir., 1966); *Skibinski* vs. *Waterman Steamship Corp.*, 1966 A. M. C. 873, 360 F.(2d) 539 (2 Cir., 1966), *cert. denied*, 387 U. S. 921 (1967); *Reid* vs. *Quebec Paper Sales & Transportation Co.*, 1965 A. M. C. 112, 340 F.(2d) 34 (2 Cir., 1965); *Strika* vs. *Netherlands Ministry of Traffic*, 1951 A. M. C. 54, 185 F.(2d) 555 (2 Cir., 1950).

consistency.[2] Analysis of these conflicts have been made in various decisions with care and discernment. Judges railed against the necessity of stultifying their judicial minds by being required "to make distasteful hair-splitting distinctions unrelated to any intelligible concepts of right and wrong" (FRIENDLY, Ct. J., in dissent in *Skibinski* vs. *Waterman S. S. Co.*, 1966 A. M. C. 873, 360 F.(2d) (1964), cert. denied, 387 U. S. 921 (1967) and to make "trivial, meaningless and confusing distinctions" (KAUFMAN, Ct. J., in dissent in *Radovics* vs. *Cunard S. S.* Co., 1966 A. M. C. 2426, 2431, 364 F.(2d) 149 (1966)).

This Court in 1962 attempted to cope with the problem by sitting *en banc* in *Puddu* vs. *Royal Netherlands S. S. Co.*, 1962 A. M. C. 419, 303 F.(2d) 752. In *Puddu* by a six to two vote, the Court sought to perpetuate Judge LEARNED HAND's

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[2] Fifth Circuit:

Dugas vs. *Nippon Yusen Kaisha*, 1967 A. M. C. 2090, 378 F.(2d) 271 (5 Cir., 1967); *Marshall* vs. *Ove Skou Rederi A/S*, 1967 A. M. C. 2537, 378 F.(2d) 193 (5 Cir., 1967); *Robichaux* vs. *Kerr McGee Oil Industries, Inc.*, 1967 A. M. C. 2082, 376 F.(2d) 447 (5 Cir., 1967); *Antoine* vs. *Lake Charles Stevedores*, 1967 A .M. C. 2085, 376 F.(2d) 443 (5 Cir., 1967); *Smith* vs. *M/V Ginza*, 1966 A. M. C. 2036, 262 F.(2d) 164 (5 Cir., 1966); *McQuiston* vs. *Freighters and Tankers Steamship Co.*, 1964 A. M. C. 1489, 327 F.(2d) 746 (5 Cir., 1964); *Neal* vs. *Lykes Bros. Steamship Co.*, 1962 A. M. C. 1959, 306 F.(2d) 313 (5 Cir., 1962); cf. *Morales* vs. *City of Galveston*, 275 F.(2d) 191 (5 Cir.); *vacated and remanded*, 364 U. S. 295 (1960), 1961 A. M. C. 2194, 291 F.(2d) 97 (5 Cir., 1961); *aff'd*, 370 U. S. 165, 1962 A. M. C. 1450 (1962).

Ninth Circuit:

Huff vs. *Matson Navigation Co.*, 1964 A. M. C. 2219, 338 F.(2d) 205 (9 Cir., 1964); *Blassingill* vs. *Waterman Steamship Corp.*, 1964 A. M. C. 1932, 336 F.(2d) 367 (9 Cir., 1964); *Beeler* vs. *Alaska Aggregate Corp.*, 1964 A. M. C. 1976, 336 F.(2d) 108 (9 Cir., 1964); *Billeci* vs. *United States*, 1962 A. M. C. 826, 298 F.(2d) 703 (9 Cir., 1962); *Tiaus* vs. *Santorini*, 1959 A. M. C. 1042, 258 F.(2d) 352 (9 Cir., 1958). See also n. 10, *infra*.

previous (1956) approach in *Grillea* vs. *United States*, 1956 A. M. C. 1009, 232 F.(2d) 919, by the "incident in a continous course of operation" theory (1956 A. M. C. 1013, 232 F.(2d) at 922). Subsequent cases (and quite to be expected) had to struggle with: what is "continuous"? and what is the "operation"? In *Puddu* the Court said both that "Time is obviously irrelevant" (1962 A. M. C. 424, 303 F.(2d) at 757) and that it should consider whether the "incident" was in a continuous course of operation and a "momentary step of phase in the progress of work on board" (Grillea, 1956 A. M. C. at 1013, 232 F.(2d) at 922). The Supreme Court denied certiorari, 371 U. S. 840, 1963 A. M. C. 280 (1962). In the ensuing years, 1962-1967, the cases continued to be decided virtually without rhyme or reason. Judge FEINBERG (The trial judge in *Candiano*, and now on this Court) has suggested with good reason considering "whether the distinction [between operational negligence and unseaworthiness] should not be dispensed with altogether." *Radovich* vs. *Cunard Steamship Co.*, 1966 A. M. C. 2426, 2431, 364 F.(2d) 149, 153 (2 Cir., 1966). Judge HASTIE in his dissent in *Thompson* vs. *Calmar*, 1964 A. M. C. 2249, 331 F.(2d) 657 (3 Cir., 1964) thought it to be "ridiculous to apply the concept of unseaworthiness to such cases as these" (1964 A. M. C. at 2258, 331 F.(2d) at 663).

Now in 1967 confusion still reigns in a field wherein there is a vast amount of litigation in the federal courts—particularly in the seacoast circuits. There should be some uniformity of rule—not only in the interest of justice but also of fairly reasonable consistency. If the courts wish to create (actually by judicial legislation) a principle that any seaman injured on board a ship is entitled to recover and the only fact question which may be submitted to the jury is his contributory negligence, if any, the trial courts,

shipowners, longshoremen and insurance companies at least will know the problems then facing them in and out of court.

But what has happened since *Alexander* and *Candiano* were argued (October 28, 1966 and December 13, 1966, respectively)?

On May 15, 1967, the Supreme Court denied certiorari in *Foster* vs. *Lykes Bros.*, 387 U. S. 908, wherein the Fifth Circuit had affirmed the District Court's denial of a recovery to a seaman on the ground that negligence of a fellow longshoreman does not make a ship unseaworthy (368 F.(2d) 326).

On May 22, 1967, the Supreme Court decided *Mascuilli, supra,* in a brief *Per Curiam* opinion as follows (1967 A. M. C. 1702):

"The petition for a Writ of Certiorari is granted and the judgment is reversed. *Mahnich* vs. *Southern S. S. Co.*, 321 U. S. 96, 1914 A. M. C. 1; *Crumady* vs. *Joachim Hendrik Fisser*, 358 U. S. 423, 1959 A. M. C. 580."

The finding of the trial court in *Mascuilli* was specifically noted by the Court of Appeals in its *Per Curiam* opinion, 1966 A. M. C. 2503, 358 F.(2d) 133 (3 Cir., 1966), the court stating that the trial court's findings, including the finding "that the accident was caused solely by the negligent operation of the stevedoring crew as stated in finding of fact No. 35," were not clearly erroneous.

On June 5, 1967, the Supreme Court denied certiorari in *Fenton* vs. *A. S. Glittre, et al.*, 387 U. S. 944, wherein this Court had affirmed the dismissal of a complaint alleging injury caused by cargo falling because of the negligent handling of a crane by a fellow longshoreman (1967 A. M. C. 316, 370 F.(2d) 146).

Petitioner in *Candiano* argues that these denials indicate that the Supreme Court did not intend to abolish the

doctrine of "operational negligence" and petitioner in *Alexander* contends that "*Mascuilli* is not authority for the proposition that the doctrine of operational negligence has now been rejected by the Supreme Court as a factor in the determination of liability." (*Alexander*, Pet. p. 5.) What the law is today will depend upon the decisions of the future.

The time element in the operation is "obviously irrelevant." Practically no loading or unloading operation could be carried on which required a separate timekeeper for every man working in a gang. Assume that every timekeeper set his stop-watch at the commencement (according to his judgment) of the "operation," it still would be necessary for the courts to fix the period permitted to elapse, before operational negligence was transformed into unseaworthiness. And since notice to the shipowner is no longer of consequence, the time element is meaningless from the standpoint of giving the owner notice of, and an opportunity to remedy, the defect.[3]

Since the Spring of 1967, the Fifth Circuit has decided at least four cases in this field. Chronologically on May 9, 1967, the Court in *Dugas* vs. *Nippon Yusen Kaisha*, 1967 A. M. C. 2090, 378 F.(2d) 271, affirmed a directed verdict in favor of the defendant where dunnage boards fell on the plaintiff. The hookup man (a fellow employee) had placed a single sling instead of the required double sling, around the load which was being lowered. The Court rejected the argument that, during the 10 to 15 seconds which elapsed between the placing of the sling and the raising of the load with the resulting fall, an unseaworthy condition had been created. But, even assuming that there were an "unsafe

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[3] *Mitchell* vs. *Trawler Racer, Inc.*, 362 U. S. 539, 549, 1960 A. M. C. 1503 (1960); *Alaska Steamship Co.* vs. *Pettersen*, 347 U. S. 396, 1954 A. M. C. 860 (1954).

condition" in this "momentary interval," the Court was satisfied that the Supreme Court's affirmance after two rounds of *Morales* (*Morales* vs. *City of Galveston*, 275 F.(2d) 191 (5 Cir.), *vacated and remanded*, 364 U. S. 295 (1960); 1961 A. M. C. 2194, 291 F.(2d) 97 (5 Cir., 1961), aff'd, 370 U. S. 165, 1962 A. M. C. 1450 (1962)) required or at least permitted this result.

However, less than a week later (May 15, 1967), the same Fifth Circuit in a case where there was no claim of negligence but solely a question of an unexplained escape from the cargo sling of the steel beam which struck and injured the plaintiff, reached a quite different result. *Marshall vs. Ove Skou Rederi, A/S*, 1967 A. M. C. 2537, 378 F.(d) 193. The trial court had found that "the equipment used in the loading operation was not shown to be unseaworthy"; the appellate court found that the gear was properly operated and that there was no evidence of negligence by any of the participants in the operation. The court had difficulty in finding "transitory unseaworthiness"* saying, "But this accident occurred under the most antiseptic conditions possible. The winch was operated properly. The load struck nothing. The sling did not break. No new agency affected the sling. The loading operation was done without negligence. The sling simply did not perform its single assigned purpose of retaining its load without dropping it while moving it from point A to point B" (1967 A. M. C. 2537, 378 F.(2d) 193, at p. 198). The Court imposed liability because the shipowner must have been aware of "anticipated operating conditions." There "the force and hazard to be incurred—

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*For the origin of this concept, see *Poignant* vs. *United States*, 1955 A. M. C. 1955, 225 F.(2d) 595, 597 (2 Cir., 1955). See also *Grillea* vs. *United States*, 1956 A. M. C. 1009, 232 F.(2d) 919, 922 (2 Cir., 1956).

single, obvious and great—by this cargo sling was the simple one of the force of gravity * * * which, unless guarded against by operating proficiency, would cause the tilted beam to slip from the sling and fall and hurt someone" (1967 A. M. C. 2537, 378 F.(2d) 193, at p. 198). Regardless of the Court's explanatory conclusion that "The present case is of failure of equipment to function while in normal use in a situation of high and known hazard and without the effect of any external force or event," the decision actually would appear to stand for the proposition that: the accident happened, therefore the ship must be considered unseaworthy. Judge RIVES' concurrence, relying on *Van Carpals* in this circuit and *Walker* and *Mills* in the Fifth, supports this conclusion: "There is simply no explanation for the accident, except either the choice of an improper method of loading or the unfitness of the sling used to lower the beam."[5] The first hypothesis, however, would appear to involve operational negligence; the second is not supported by the facts because the equipment was found by the trial court to be without defect and of the type customarily used for this operation.

To add to the confusion, the Fifth Circuit on April 13, 1967, had decided *Antoine* v. *Lake Charles Stevedores, Inc.*, 1967 A. M. C. 2085, 376 F.(2d) 443 and *Robichaux* v. *Kerr McGee Oil Industries, Inc.*, 1967 A. M. C. 2082, 376 F.(2d) 447. In *Antoine*, the plaintiff was injured when pinned against the side of the ship by a load being lowered into the hold. The trial court had concluded that "operational negligence" could not be characterized as "unsea-

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[5] *Van Carpals* vs. *S. S. American Harvester*, 1962 A. M. C. 395, 297 F.(2d) 9 (2 Cir., 1961); *Walker* vs. *Harris*; 1964 A. M. C. 1759, 335 F.(2d) 185 (5 Cir., 1964); *Mills* vs. *Mitsubishi Shipping Co.*, 1966 A. M. C. 1318, 358 F.(2d) 609 (5 Cir., 1966).

worthiness" and dismissed the case. On appeal, the court affirmed. But, on the assumption that that court had never "expressed itself, until now [April 1967], in the specific area of 'operational negligence,'" it then proceeded (after analyzing many cases) to come to the conclusion that "It would serve no useful purpose to rehash the many decisions by the Supreme Court and the various Courts of Appeals since *Sieracki, supra* (1967 A. M. C. 2089, 376 F.(2d) at 446). However, since to that court "it does not appear that the Supreme Court has gone so far as to hold that the shipowner is liable for 'instant unseaworthiness,' based upon the very act of a fellow longshoreman which causes the injury" (1967 A. M. C. at 2086, 376 F.(2d) at 445), the dismissal was affirmed. In *Robichaux,* the same panel remanded for specific findings as to whether the alleged negligence created an unseaworthy condition. In both cases as well as in the court's analysis of the Ninth Circuit cases, the time element was stressed, the court in *Robichaux* indicating that if "appellant was injured *after* the negligence took place, rather than at the time of the negligent act, the vessel would, under the law, be considered unseaworthy, *Beeler* v. *Alaska Aggregate Co.,* 1964 A. M. C. 1978, 336 F.(2d) 108 (9 Cir., 1964) and *Blassingill* v. *Waterman Steamship Co.,* 1964 A. M. C. 1932, 336 F.(2d) 367 (9 Cir., 1964); not otherwise (1967 A. M. C. at 2085, 376 F.(2d) at 449).

The time element ("momentary interval of time") stressed in *Antoine, Robichaux,* and *Dugas* as a determining factor was not mentioned in *Marshall.* There the element against which the shipowner should have guarded was said to be the force of gravity.

This "rehash" has probably been no more fruitful than the many previous reviews of cases by the various circuits searching for, but not finding, a rational basis for decision. The real difficulty in the future will arise at the

trial level. If there are any facts to be determined by a jury other than assessment of damages and contributory negligence, how is the trial judge to charge? Is "operational negligence" to be mentioned at all? When does the "operation" commence? How momentary is a "momentary interval"? Is "instant negligence" to be added to "instant unseaworthiness"? Many other similar questions undoubtedly will arise.

Some guidance from the Supreme Court in this area may be found at the end of the majority opinion in *Mitchell* v. *Trawler Racer, Inc.*, 362 U. S. 539, 1960 A. M. C. 1503 (1960), where the Court, apparently unwilling to state affirmatively a rule of absolute liability, added a penultimate paragraph which has been used in whole or in part by almost every trial judge since 1960, either in the jury charge or in a non-jury decision. The Court, citing *Sieracki*[6] and *Mahnich*,[7] had just said that "the shipowner's duty to provide a seaworthy vessel" is "absolute" (*Mitchell*, 362 U. S. at 549, 1960 A. M. C. at 1511). But the court straightway answered the question: what is the duty which is absolute?, by stating "it is a duty only to furnish a vessel and appurtenances reasonably fit for their intended use." Were a trial judge to follow *Mitchell*, a charge, refreshingly simple could be made, in substance: "The shipowner is not obligated to furnish an accident-free ship but only a vessel and appurtenances reasonably fit and suitable for their intended use and service." Based upon the Supreme Court decisions between 1945 and 1960, the law may have been clear in 1960, namely, that a principle of "complete divorce-

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[6] *Seas Shipping Co.* vs. *Sieracki*, 328 U. S. 85, 1946 A. M. C. 698 (1946).

[7] *Mahnich* vs. *Southern S. S. Co.*, 321 U. S. 96, 1944 A. M. C. 1, (1944).

ment of unseaworthiness liability from concepts of negligence'' (*Mitchell,* 362 U. S. at 550, 1960 A. M. C. at 1512) had evolved, but this clarity has been considerably dimmed by appellate decisions between 1960 and 1967. Negligence would appear to create unseaworthiness from the very moment of the act. The words ''reasonably fit'' and ''reasonably suitable'' lose all significance if the happening of the accident in and of itself is regarded as an adequate demonstration that the ship was not in such condition. See *Marshall, supra.*

Both *Candiano* and *Alexander* under modern concepts of unseaworthiness present ''unseaworthy'' facts. Even though operational negligence created the unseaworthiness, it is difficult to find any place for such a doctrine as a defense against liability, if the very finding of operational negligence is a simultaneous finding of unseaworthiness. The alchemy is instantaneous.

In summary *Mascuilli* may be explained on the basis of *Crumady,*[8] namely, that the safety circuit breaker was improperly set so that the controller did not trip and thus cut off the power. *Waldron*[9] (May 8, 1967) may have created a doctrine of unseaworthy seamen. The Fifth and Ninth Circuit cases speak of operational negligence and try to set up a momentary time theory. The Third and Fourth Circuits are virtually committed to an absolute liability doctrine.[10] Were *Candiano* to be resubmitted to-

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[8] *Crumady* vs. *J. H. Fisser,* 358 U. S. 423, 1959 A. M. C. 580 (1959).

[9] *Waldron* vs. *Moore-McCormack Lines,* 386 U. S. 724, 1967 A. M. C. 579 (1967).

[10] *Thompson* vs. *Calmar,* 1964 A. M. C. 2249, 331 F.(2d) 657 (3 Cir., 1964), *cert. denied,* 379 U. S. 913 (1964); *Ferrante* vs. *Swedish American Lines,* 1964 A. M. C. 2268, 331 F.(2d) 571 (3 Cir., 1964), *cert. dismissed,* 379 U. S. 801 (1964); *Scott* vs. *Isbrandtsen,* 1964 A. M. C. 1126, 327 F.(2d) 113 (4 Cir., 1964).

day, these intervening cases would only strengthen the conclusion that the negligent hook-up followed by "an appreciable period of time" (as found by the trial court) would create an unseaworthy condition. As to *Alexander*, the protruding dunnage alone would have produced a similar conclusion.

In my opinion, the whole process of straining to impose liability has become completely unrealistic. As a basis for decision, the term "unseaworthy" is utterly meaningless as Noah Webster defined the word. From the time notice to the shipowner of a defect with a reasonable opportunity to remedy it was written out of the law, the instances, to which the word unseaworthy has been applied, to my mind have advanced (or retrogressed) from the absurd to the ridiculous. However, believing the function of the courts to be adjudication in accordance with current applicable decisions (and not judicial legislation) I adhere to the decisions already rendered in *Candiano* and *Alexander* and, hence, believe that a rehearing by the Court would serve no useful purpose.